ESTATE OF JACOB WILLIAM NICHOLAI

IBIA 95-138-Q Decided April 12, 1996

Questions certified by Administrative Law Judge William E. Hammett in IP SA 62N 95.

Certified questions addressed; case returned to Hearings Division.

1. Alaska: Indian and Native Affairs--Indian Probate: Adoption: Generally--Indian Probate: Alaskan Natives: Generally

25 U.S.C. § 372a, which establishes the proof necessary for recognition of adoptions in probate proceedings under the jurisdiction of the Department of the Interior, applies in the State of Alaska.

APPEARANCES: Linda J. Johnson, Esq., and Robert L. Manley, Esq., Anchorage, Alaska, for Robert and Sarah Nicholai; Darryl L. Thompson, Esq., Anchorage, Alaska, for Helen Cox; Sandra J. Ashton, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Assistant secretary Indian Affairs.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On July 24, 1995, the Board of Indian Appeals (Board) received a memorandum from Administrative Law Judge William E. Hammett in which the Judge certified to the Board five questions of law arising in the context of the Estate of Jacob William Nicholai, IP SA 62N 95. 1/ The questions generally concern the application of 25 U.S.C. § 372a (1994) 2/ in the State of Alaska. The Board accepted Judge Hammett's certification under 43 CFR 4.28. 3/

1/ Subsequent to the certification of these questions, jurisdiction over this estate was transferred from Judge Hammett to Administrative Law Judge James H. Heffernan.

2/ Unless otherwise indicated, all further citations to the United States Code are to the 1994 edition.

3/ Section 4.28 provides in pertinent part:

"There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be

Background

In an October 22, 1992, order approving will in the Estate of Willie Nicholai, IP SA 100N 91, Judge Hammett found that Jacob William Nicholai (Jacob) was the culturally adopted son of Willie Nicholai. Jacob died on May 8, 1993.

After scheduling a hearing in Jacob's estate, Judge Hammett received a motion from Robert and Sarah Nicholai, who stated that they were Jacob's natural parents. They sought a pre-hearing ruling from Judge Hammett on the question of whether collateral relatives could inherit from a culturally or equitably adopted person. Judge Hammett denied the motion and, instead, certified the five questions mentioned above to the Board.

In his certification order, Judge Hammett referred to his 1982 order in the Estate of Nick Elia, IP SA 199N 79, in which he had determined that the provisions of 25 U.S.C. § 372a did not apply in Alaska. The Judge's analysis of the issue is laid out in Elia:

> [C]areful review of the language and legislative history of 25 U.S.C. 372a, convinces this forum that such act was never intended to apply to Natives of Alaska. While it is true that it has been held that the federal acts concerning Indians generally apply to Natives of Alaska, [4/] I do not believe that such is the situation insofar as 25 U.S.C. 372a is concerned.
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> An analysis of the language of the act, the legislative history, and the circumstances existing in Alaska at the time of the passage of the act supports this position. The act reads as follows:
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> > In probate matters under the jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption
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> > (1) Unless such adoption shall have been
> >
> > (a) by a judgment or decree of a State court;

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footnote 3, continued:
granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision."

In Estate of James Largo, 12 IBIA 224, 91 I.D. 185 (1984), the Board held that Administrative Law Judges could certify controlling questions of law in Indian probate matters to the Board under 43 CFR 4.28.

4/ Judge Hammett cited 54 I.D. 39 (1932) in a footnote. The complete citation for this Departmental Solicitor's Opinion is Validity of Marriage Custom among the Natives or Indians of Alaska, M-27185, 54 I.D. 39 (1932), reprinted as Custom Marriage - Validity - Alaska, 1 Op. Sol. on Indian Affairs 329.

(b) by a judgment or decree of an Indian court;

(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section [January 8, 1941] or in the distribution of the estate of an Indian who died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

This section shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this section. * * *

Section 372a refers to a judgment or decree of a State court, yet Alaska was still a territory at the time that the act codified in Section 372a was enacted. If the act were intended to apply to Alaska, the Congress could have broadened the scope by referring to a judgment or decree of a State "or Territory" court. It is notable that the Congress did use the language "state or territory" in the General Allotment Act, * * * 25 U.S.C. 348. This Act, passed some fifty years prior to 25 U.S.C. 372a has been determined to be applicable to Natives of Alaska. * * * Admittedly, if this were the sole reason to state that such section does not apply to Alaska Natives, it would be thin evidence indeed. However, further analysis adds substance to the position that the Act is inapplicable to Alaska Natives. The act refers to a judgment or decree of an Indian court. With the possible exception of the Metlakatla Indians, there have never been Indian courts in Alaska; however, there were tribal courts on the various reservations in the contiguous United States at the time [25 U.S.C. § 372a] was enacted.

The act further refers to a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose. There were no superintendents of Bureau of Indian Affairs agencies in Alaska in 1940 because there were no agencies. There was an Alaska Native Service in Juneau, but it is highly doubtful that the Service kept a book for recording adoptions. Furthermore, it is most difficult, if not impossible, to conceive that the Native population of Unalaska, Alaska, which is at least 1,500 miles from Juneau, or of Nome, Alaska, which is about 1,000 miles from Juneau, were even aware that there was an Alaska Native Service in Juneau.

The act further refers to an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose. The tribal authority referred to must have been the tribal organizations on various reservations in the contiguous United States because such formal tribal organizations were unknown to the remote bush villages of Alaska. While village organizations were organized under the Indian Reorganization Act [IRA; 25 U.S.C. § 476; see also §§ 473, 473a], these organizations were established primarily for economic purposes, and, to my knowledge, never functioned in the same manner as the formal tribal organizations, recognized by the Department of the Interior, which operated as the governing bodies of tribal entities in the contiguous United States. Certainly, it is extremely doubtful that any IRA village ever established a procedure for recognition of Native custom adoptions and kept a book for recordation of Native custom adoptions. Further, it is highly improbable that such IRA villages would have had the authority to develop such procedure or keep a book an which to record adoptions.

Analysis of the Report to accompany H.R. 8499, dated February 8, 1940, from Harold L. Ickes, Secretary of the Interior, to the Speaker of the House of Representatives, and analysis of [25 U.S.C. § 372a] gives further credence to the position that the Act was never intended to apply to Natives of Alaska. Neither the report, the legislative history, nor the act make any mention of Alaska. The tenor of the language of both the report and the legislative history is such that it does not lend itself to any inference that the act was intended to apply to Natives of Alaska.

For the reasons herein stated, I find that 25 U.S.C. 372a does not apply to Natives of Alaska. Therefore, I further find that there is no Federal law which is preemptive as to adoptions.

By * * * 28 U.S.C. 1360, the Federal government ceded to Alaska jurisdiction over the civil affairs of Natives of Alaska,

with the exception set out in the subsection (b) of said Section 1360, a part of which exemption is retention of probate jurisdiction by the Federal government.

Therefore, it is appropriate to determine whether there is any Alaska statutory or case law which would preclude recognition of Native custom adoption. In fact, the Supreme Court of Alaska in Calista Corporation v. Mann, Alaska, 564 P.2d 53 (1977) recognized cultural adoption under the doctrine of equitable adoption * * *

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* * * [T]he Alaska Supreme Court made the following statement * * *:

> The United States of America, and Alaska, in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles.
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> One factor which makes Alaska particularly unique in this regard is the existence of various Native cultures which remain today much as they were prior to the infusion of Anglo-American culture.
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> While from a sociological standpoint this diversity of lifestyles has added strength to the cultural mosaic which comprises the Alaska community, it has created problems in administering a unified justice system sensitive to the needs of the various cultures. * * *
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> In addition to the obvious cultural differences which are present in Alaska, we have observed that there is a "unique relation between bush and metropolitan areas in Alaska" and have stated that this factor is an appropriate one for consideration when examining the application of the laws to citizens of the bush areas.
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> Accordingly, we conclude that the doctrine of equitable adoption is an appropriate vehicle which can be utilized in intestate succession cases to avoid hardships created in part by the diversity of cultures found within this jurisdiction.

The Court clearly and concisely sets forth the major reason for not applying the criteria of Section 372a to Alaska

custom adoptions. To do so would result in great and frequent inequities. The Court in Calista * * * delineated the criteria which must be met in determining whether an equitable adoption has occurred. The criteria are as follows:

> After reviewing the cases of other jurisdictions, we have identified and now set forth the pertinent considerations which the trial court must examine in order to determine if equitable adoption can be established. The five elements that we find to be pertinent considerations are: (1) the foster parents must have died intestate; (2) there must have been a contract or agreement to adopt, either express or implied from the surrounding facts; (3) the foster parents must have represented to the child, either expressly or by their conduct, that he or she was adopted, thereby inducing the child, to the extent that his or her age permitted, to perform duties expected; (4) the child, to the extent that his or her age permitted, must have carried out his or her filial obligations in the belief that he or she was an adopted child; and (5) any steps taken by the foster parents to legally adopt the child must not have been perfected. We further hold that equitable adoption must be established by clear and convincing evidence.

However, the court went on to state that criteria No. 3 and 4 are not mandatory. I concur with the court both as to the criteria necessary to establish equitable adoption and the determination that criteria No. 3 and 4 are not mandatory.

In numerous cases within this forum, the custom of Native adoption both among the Eskimos and Athabascan Indians has been established by testimony and documentary evidence. The custom is also set out in a letter dated January 8, 1982, from the Supervisor, Special Services Unit, Department of Health and Social Services, State of Alaska, to the undersigned, an excerpt from which letter reads as follows:

> Many of the native children in Alaska are adopted by the native cultural custom which is just giving the child to another family to raise. Some children return to the natural parents and others are raised by foster parents from birth to young adulthood. Legal action through the court is never taken in an adoption process of this nature.

Estate of Nick Elia, IP SA 199N 79, March 25, 1982, Order Determining Heirs at 1-6. Accord, Estate of Cecelia Phillips, IP SA 166N 81, March 25, 1982, Order Determining Heirs at 1-7.

Based on his concerns over the correctness of his decision regarding the applicability of 25 U.S.C. § 372a, and the fact that the Board had not addressed the issue, 5/ Judge Hammett certified to the Board that question, as well as four others concerning cultural and/or equitable adoptions. The certified questions have been ably briefed by the opposing parties to this case, as well as by the Office of the Solicitor on behalf of the Assistant Secretary - Indian Affairs.

Judge Hammett has requested expedited consideration, stating that he is holding several other probates pending resolution of the issues raised here. Expedited consideration is granted.

Discussion and Conclusions

Question 1: "Is the Act of July 8, 1940, 54 Stat. 746, 25 U.S.C. 372a applicable to Alaska?"

Judge Hammett cited five reasons why he believed 25 U.S.C. § 372a did not apply in Alaska: (1) the statute refers to states, but in 1940 Alaska was still a territory; (2) the statute refers to Indian courts, but, with the possible exception of the Metlakatla Indian Community, there were no Indian courts in Alaska in 1940; (3) the statute refers to BIA superintendents, but there were no BIA agencies, and consequently, no BIA superintendents in Alaska in 1940; (4) the statute refers to a procedure for adoption established under tribal authority, but the village organizations in Alaska were primarily economic, rather than governmental, entities; and (5) nothing in the statute or its legislative history mentions Alaska and the language of those documents does not lend itself to an inference that Congress intended the statute to apply in Alaska.

The Board begins its analysis with the statute itself. On its face, section 372a does not contain any language that would obviously exclude its application in Alaska. To the contrary, the statutory construction principle of expressio unius est exclusio alterius (the expression of one thing is the exclusion of others) would suggest that, because Congress specifically excluded the Five Civilized Tribes and the Osage Indian Tribe from the statute, it did not intend for there to be any other exclusions. See, e.g., Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"); United States v. Newman, 982 F.2d 665 (1st Cir. 1992), cert. denied, 114 S.Ct. 59 (1993); In Re Gerwer, 898 F.2d 730 (9th Cir. 1990).

5/ Although the issue of custom adoptions in Alaska was raised in several appeals, each of those appeals was disposed of on other grounds without the Board's reaching the adoption issue. See, e.g., Marvin v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 260, 263 n.3 (1986).

Despite this, the Board is mindful of the Supreme Court's admonition that

> "[t]he starting point in every case involving construction of a statute is the language itself." * * * But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. * * * This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." * * * The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. [Citations omitted.]

Watt v. Alaska, 451 U.S. 259, 265-66 (1981). See also Wyandotte Tribe of Oklahoma v. Muskogee Area Director, 28 IBIA 247, 249 (1995).

Judge Hammett first noted that in 1940, Alaska was a territory rather than a state, and 25 U.S.C. § 372a refers only to states. 6/ The Supreme Court has discussed whether the term "state," as used in various Federal statutes, includes "territory." In two cases in which the majority opinions were written by Mr. Justice Reed, the Court reached different results on this question. In Andres v. United States, 333 U.S. 740 (1948), the Court held that the term "state" in 18 U.S.C. § 542 (1946) included the Territory of Hawaii. 18 U.S.C. § 542 granted Federal district courts authority to sentence a convicted criminal to death in "the manner prescribed by the laws of the State within which the sentence is imposed." Andres, who was convicted of first degree murder on Federal Government property on Oahu, Territory of Hawaii, contended "that the phrase 'laws of the State' limit[ed] the statute to the forty-eight states, and, consequently, provide[d] no method of inflicting the death penalty where that sentence [was] imposed by a district court sitting in a Territory." 333 U.S. at 745. The Court summarily rejected this contention, stating in footnote 6: "The intent of Congress would be frustrated by construing the statute to create that hiatus for which the petitioner contends." Id.

Eleven months later, in Stainback v. Mo Hock Le Lok Po, 336 U.S. 368 (1949), the Court held that the term "state" in Judicial Code § 266, initially codified at 28 U.S.C. § 380 (1946), did not include the Territory of Hawaii. Section 266 established procedures for challenging the constitutionality of State statutes in Federal courts. In Stainback, the court noted that it had

> summarized in Phillips v. United States, 312 U.S. 246 [(1941)], the purpose and effect of § 266 and extracted from its history

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6/ The following discussion assumes arguendo that the statute should be read as of the date of its enactment, rather than as of the date it is being interpreted. Obviously, in 1982, when Judge Hammett held that 25 U.S.C. § 372a did not apply in Alaska, Alaska was a state. In contrast, the two Supreme Court cases discussed infra were rendered when Hawaii was still a territory.

> and the precedents for the section's application a congressional requirement of strict construction to protect our appellate docket while assuring the states that exceptionally careful judicial consideration would guard them against all assaults, through federal courts, against their legislative statutes or administrative board orders by applications for injunction when those assaults were based on the Federal Constitution.

336 U.S. at 375. The Court concluded that the purpose of section 266, which was to avoid unnecessary interference with the laws of sovereign states, was not furthered by an interpretation of "state" to include "territory" because territories were not sovereign, but were subject to regulation by Congress. In reaching this conclusion, the Court specifically distinguished Andres, thereby giving clear guidance on this issue. The Court stated:

> In [Andres], we thought the purpose of Congress would be frustrated by a holding that the word "state" in a federal statute * * * did not include "Territory." * * * Here the purpose of the statute * * * is not furthered by an interpretation of state to include territory.

336 U.S. at 378-79.

The Court has expressly instructed that the determination of whether the term "state" includes "territory" in a particular statute depends upon whether application of the substance of the statute to territories would further or frustrate Congressional intent in enacting the statute. Therefore, the question of whether section 372a applies in a territory must be considered in light of the intent of the statute.

Judge Hammett's fifth reason for concluding that section 372a does not apply in Alaska addresses the intent of the statute, and considers the rather limited legislative history. The Board reviewed the legislative history of section 372a in Estate of Victor Young Bear, 8 IBIA 254, 260-68, 88 I.D. 410, 413-18 (1981), reversing 8 IBIA 130, 87 I.D. 311 (1980). The Board revisited the statute's legislative history in Estate of Irene Theresa Shoots Another Butterfly, 16 IBIA 213, 218-19 (1988):

> [I]t is clear from the legislative history of § 372a that it was the unreliability of oral evidence concerning Indian custom adoption which gave rise to the need for the legislation. The problem was described in the * * * letter [from the Secretary of the Interior submitting the proposed legislation] reprinted in [H.R. Rep. No. 1694, 76th Cong., 3rd Sess. 2 (1940)]:
>
> > It is the present practice of this Department to recognize the so-called "Indian custom" adoption whenever sufficient evidence of the decedent's intention exists. At one time Indian custom adoptions were by formal ceremonies, but in most tribes this ancient practice has been relaxed and it is difficult to determine

> whether or not an adoption was actually made in a particular case. In none of the Indian custom adoptions is there a written record and the available evidence is often confusing, conflicting, and of dubious character.
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> * * * Thus, the Department proposed to replace oral evidence concerning Indian custom adoption with a written record. The House report states that "[t]he broad purpose of the bill is to require that there be a written record of each adoption', and that the bill "places both the Indian and this Department in a position where in all probate cases a record will be available that will amply protect the bona fide claimant and likewise eliminate the imposter." Id. [Footnote omitted.]

See also S. Rep. No. 1525, 76th Cong., 3rd Sess. (1940).

Based on both its past and present consideration of the legislative history of section 372a, the Board concludes that the Department proposed the legislation because of problems arising in probate proceedings when children were raised by persons other than their natural parents under circumstances which might or might not indicate that the arrangement was intended to alter the parental relationship, and because of the unreliability of oral testimony concerning such arrangements, especially when that oral testimony was presented after the death of at least one of the principals involved. The legislative history shows that the intent of the statute was to replace unreliable oral testimony about alleged cultural adoptions with a requirement that a claim of adoption--for Federal probate purposes--be supported by some written record.

This being the intent of the statute, the question is whether that intent is furthered or frustrated by construing "state" in section 372a to include "territory." The Board finds that the same problems exist with regard to oral testimony concerning cultural adoptions whether those alleged adoptions occurred in a state or in a territory. Therefore, it holds that the intent of the statute would be furthered by an interpretation of "state" to include "territory" in section 372a, and that the intent would be frustrated by the opposite construction. The Board concludes that the fact that section 372a mentions only states did not prevent its application in a territory. 7/

7/ Judge Hammett also noted that the General Allotment Act specifically mentioned territories. The General Allotment Act was passed in 1887. The Board takes official notice of the fact that in 1887, vast stretches of country west of the Mississippi River were not states. Without attempting to determine the exact status of each area as of 1887, the Board notes that Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming all became states after 1887. Each of these states has--and had--a significant Indian population. In contrast, only Alaska and Hawaii remained territories in 1940.

Continuing with the legislative history of section 372a, Judge Hammett also relied on the fact that neither the statute nor its legislative history mentioned Alaska.

Although not specifically addressing her argument to the failure of the legislative history to mention Alaska, the Assistant Secretary contends that the statute applies to all Indians, including Native Alaskans. She cites Status of Alaska Natives, M-26915, 53 I.D. 593 (1932), 1 Op. Sol. on Indian Affairs 303, as showing that the status of Alaska Natives is similar to that of other Indians and that the general laws of the United States apply to Alaska. She also cites Authority of the Secretary of the Interior to Dispose of Reindeer Belonging to Estates of Deceased Natives of Alaska, M-27172, 54 I.D. 15 (1932), reprinted as Regulation of Reindeer owned by Alaska Natives, 1 Op. Sol. on Indian Affairs 320, in arguing that Alaska Natives are subject to the statutory scheme for the probate of restricted Indian property, and that "natives of Alaska * * * are to be considered as included in the operation of general laws appertaining to Indians." 54 I.D. at 18, 1 Op. Sol. on Indian Affairs at 322.

Judge Hammett cited a third 1932 Solicitor's Opinion holding that general acts pertaining to Indians applied to Alaska Natives. See note 4, supra.

The fact that these Solicitor's Opinions predated the enactment of section 372a in 1940 raises the possibility that Congress was aware of, and agreed with, the Department's position that general laws governing Indians applied to Alaska Natives in the absence of an express intention to exclude them. Cf. White Mountain Apache Tribe v. Phoenix Area Director, 16 IBIA 51, 60 n.10 (1988) ("Although the age * * * of an [agency] interpretation does not give it immunity * * *, it does suggest that the public, the Congress, and the courts have had an opportunity to become aware of the agency's position. 'Under some circumstances, Congress' failure to repeal or revise in the face of [an] administrative interpretation has been held to constitute persuasive evidence that this interpretation is the one intended by Congress.' Zemel v. Rusk, 381 U.S. 1, 11 (1965)"). 8/

Even without resorting to a presumption that Congress acquiesced in the Department's view that general Indian laws apply to Native Alaskans,

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8/ See also Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years"); Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight"); United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915), and cases cited therein.

the Board finds that the mere absence of reference to Alaska in either section 372a or its legislative history is too flimsy a reed to support a conclusion that Congress intended to exclude Alaska from the coverage of the statute.

In discussing his reasons 2, 3, and 4, Judge Hammett points out that some of the ways for proving adoption enumerated in the statute were not available in Alaska in 1940. The fact that not all of the possible forms of proof were available in Alaska does not require a conclusion that the statute was not intended to apply there. The Board might be more inclined to entertain the possibility that the statute should not be applied in Alaska if none of the enumerated methods of proof were available there. However, at least one method--adoption through state, i.e., territorial, court--was available, even if not routinely used. 9/

[1] After reviewing the language and legislative history of 25 U.S.C. 372a, and the points raised by Judge Hammett, the Board holds that there is no definitive evidence to support a holding that Congress did not intend section 372a to apply in Alaska. In the absence of such evidence, the Board can only conclude that the statute applies in Alaska.

The remaining certified questions concern general issues of interpretation of 25 U.S.C. § 372a. The Board has concluded that an interlocutory ruling on these questions is not necessary for resolution of this case, and that they should instead be addressed by the Administrative Law Judges in the context of an actual case in controversy.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.28, this case is returned to the Hearings Division for further action consistent with this decision.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

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9/ It is the Board's understanding that many tribes in the contiguous 48 states did not have a functioning court system in 1940, even though a tribal court might have been authorized under an IRA constitution.

In addition, although the Board does not profess to have knowledge on the issue beyond its experience in handling a rather limited number of probate appeals, it is not aware of any tribe which has the type of tribal procedure for approval and recordation of adoptions that is contemplated by 25 U.S.C. § 372a(1)(d).